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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DENNIS RAY HANSON, Defendant and Appellant.	F069169 (Super. Ct. No. 138089) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Clara M. Levers, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Detjen, J. and Franson, J.

INTRODUCTION

The Three Strikes Reform Act of 2012 (Proposition 36) permits third strike offenders serving indeterminate life sentences for crimes that are not serious or violent felonies to petition for resentencing. (Pen. Code,[1] § 1170.126 et seq.) If a petitioning offender satisfies the statute's eligibility criteria, they are resentenced as a second strike offender "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).)

Following the enactment of Proposition 36, defendant filed a petition for resentencing. The court found defendant posed an unreasonable risk to public safety, however, and denied the petition. On appeal, defendant contends (1) Proposition 36 violates defendant's equal protection rights, (2) the People were required to prove defendant's current dangerousness beyond a reasonable doubt, (3) the court erred by permitting victim impact testimony, (4) the court improperly relied on the People's written opposition to defendant's petition, (5) there was insufficient evidence to support the court's finding of dangerousness, and (6) the definition of "'unreasonable risk of danger to public safety'" included in section 1170.18, subdivision (c), applies to Proposition 36. We affirm.

FACTS

On May 26, 1998, following a bench trial, defendant was found guilty of felony corporal injury of a cohabitant (§ 273.5). As defendant had prior strikes for assault with a deadly weapon and false imprisonment with use of a weapon, he was sentenced to a term of 28 years to life in prison as a third strike offender.[2] On June 18, 2013, following the passage of Proposition 36, defendant filed a petition seeking resentencing under that law.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] Defendant was sentenced to 25 years to life for the third strike offense, plus three one-year prior prison term enhancements.

On August 30, 2013, the People filed an opposition to defendant's petition. The People stated defendant's most recent conviction occurred after he punched his girlfriend, threatened to kill her, and struck her 80-year-old mother. The opposition also included the details of defendant's prior criminal history, which spanned from 1973 to 1998 and included two additional convictions for corporal injury to a cohabitant, two convictions for driving under the influence, two convictions for assault with a deadly weapon, three convictions for battery, and convictions for false imprisonment, resisting arrest, theft, and grand theft.

The People also attached a number of exhibits outlining defendant's disciplinary history while incarcerated, which detailed at least four incidents involving the verbal abuse and intimidation of female staff, most recently in 2012, two incidents of physical violence involving another inmate, most recently in 2009, and several other instances of verbal abuse and insubordination towards staff.

A hearing on defendant's petition was held on January 8, 2014, and March 17, 2014. At the hearing, the victim of defendant's most recent offense, Cynthia Codoni, testified that during her time with defendant, he constantly threatened to kill her, threatened to kill her mother, broke her ribs and ruptured her eardrum. Defendant then testified on his own behalf, stating his disciplinary problems while incarcerated were due to his attitude and "just having bad days sometimes." He stated he knew it was time to let go of his anger and attitude issues. His son testified that, if defendant were released, he would take him in.

After the conclusion of the hearing, the court found that defendant posed an unreasonable risk of danger to public safety and denied the petition for resentencing. In support of this finding, the court cited defendant's near-continuous history of violent crime when not incarcerated, his pattern of verbally abusive and physically violent behavior while incarcerated, and his lack of remorse and insight as dispositive factors. This appeal followed.

DISCUSSION

I. The Provisions of Proposition 36 Do Not Violate Defendant's Equal Protection Rights.

Under Proposition 36, offenders sentenced prior to the effective date of the law are eligible for retroactive application of Proposition 36's revised sentencing calculations, but only if the court determines the inmate does not pose an unreasonable risk of danger to public safety. Offenders sentenced after the effective date of the law, however, are automatically and unconditionally subject to the revised sentencing procedures. On appeal, defendant argues this differing treatment between offenders sentenced prior to the effective date of Proposition 36 and offenders sentenced after that date violates his right to equal protection under the law. We disagree.

As we noted in *People v. Yearwood* (2013) 213 Cal.App.4th 161, 179, "the distinction drawn between felony offenders sentenced before, and those offenders who are sentenced after [Proposition 36's] effective date, does not violate [an] appellant's state or federal equal protection rights." A law may treat members of different classes in different ways if it is rationally related to a legitimate government interest and the distinctions are not based on suspect classifications. (*People v. Turnage* (2012) 55 Cal.4th 62, 74-75.) Prisoners are not a suspect class. (See *People v. Cruz* (2012) 207 Cal.App.4th 664, 676, fn. 11.) Further, the state has a legitimate interest in ensuring "that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*In re Kapperman* (1974) 11 Cal.3d 542, 546; see *People v. Floyd* (2003) 31 Cal.4th 179, 191.) Accordingly, treating prisoners sentenced before to the effective date of Proposition 36 and offenders sentenced after that date differently is rationally related to a legitimate state interest, and defendant's equal protection argument must fail.

II. Dangerousness Need Not be Proven Beyond a Reasonable Doubt.

Defendant also contends that the People were required to prove his dangerousness beyond a reasonable doubt. We disagree.

Under section 1170.126, subdivision (f), the determination of a petitioner's dangerousness is left to the discretion of the trial court. "[A] court's discretionary decision to decline to modify the sentence in [a petitioner's] favor can be based on any otherwise appropriate factor (i.e., dangerousness), and such factor need not be established by proof beyond a reasonable doubt to a jury." (*People v. Superior Court* (2013) 215 Cal.App.4th 1279, 1303 (*Kaulick*).) Instead, "once a defendant is eligible for an increased penalty, the trial court, in exercising its discretion to impose that penalty, may rely on factors established by a preponderance of the evidence." (*Id*. at p. 1305.)

Given the foregoing, we conclude the court's decision to deny a petition for recall of sentence is reviewed only for an abuse of discretion, and need not be supported by a proof beyond a reasonable doubt, or even by a preponderance of the evidence. That is not to say, however, that the trial court's decision need not be supported by evidence. As noted in *Kaulick*, the burden of proof falls with the People, and the facts relied on by the court must be established by a preponderance of the evidence. (*Kaulick*, *supra*, 215 Cal.App.4th at p. 1305.) Put differently, while the court's decision need not be established by a preponderance of the evidence, the facts relied upon by the court must be established by a preponderance of the evidence. Defendant's claim that dangerousness must be proven beyond a reasonable doubt is without merit.

III. The Victim Impact Statement was Properly Heard.

Next, defendant contends the court erred by considering the victim impact statement of Cynthia Codoni. We disagree.

Proposition 36 provides that "[a] resentencing hearing ordered under this act shall constitute a 'post-conviction release proceeding' under paragraph (7) of subdivision (b) of Section 28 of Article I of the California Constitution (Marsy's Law)." (§ 1170.126,

subd. (m).) Under Marsy's Law, crime victims are entitled to "reasonable notice of all ... parole or other post-conviction release proceedings, and to be present at all such proceedings." Marsy's Law also provides victims a right to be heard at any proceedings involving post-conviction release decisions. (Cal. Const., art. I, § 28, subd. (b)(8).)

Here, because Proposition 36 explicitly defines a resentencing hearing as a post-conviction release proceeding and Marsy's Law explicitly entitles a victim to be heard at any proceedings involving post-conviction release decisions, we find that the victim in this case had a right to make a victim impact statement before the court. To hold otherwise would permit a victim to be heard at the resentencing hearing held after the dangerousness determination, but not during the dangerousness determination that determines an inmate's eligibility for resentencing. However, "as a practical matter, it would make little sense to permit the crime victim to be heard on the issue of which second strike term to impose, but not permit the victim to be heard on the issue of whether resentencing the defendant at all would present a risk of dangerousness." (*Kaulick, supra*, 215 Cal.App.4th at p. 1300.) Accordingly, we conclude victims have a right to be heard at the hearings regarding both dangerousness and resentencing.

IV. The Court Properly Considered the People's Written Opposition.

Next, defendant argues the court erred by considering the contents of the People's opposition to defendant's petition for recall of sentence, as that opposition was never entered into evidence. We disagree.

When determining whether the inmate poses an unreasonable risk of danger to public safety, the court may consider the inmate's criminal conviction history, disciplinary record and rehabilitation records while incarcerated, and "[a]ny other evidence the court, within its discretion, determines to be relevant ...." (§ 1170.126, subd. (g)(3).)

In the instant case, while it appears as though the People's written opposition was never expressly admitted into evidence, such an opposition has clear relevance to

resentencing proceedings, and the contents dealt primarily with the details of defendant's criminal conviction history and disciplinary record.[3] Given the court's broad discretion to consider relevant evidence under the statute, as well as plain statutory language permitting the court to consider an inmates criminal and disciplinary records, we simply cannot conclude the court erred by considering the People's written opposition when making its dangerousness determination.

Further, "It is well established, ... that when a document has been considered by the court and the parties as being in evidence, the fact that no formal offer in evidence was made will not exclude it from consideration as part of the record on appeal. [Citations.] 'Where documents are not formally introduced, but it is apparent that the court and the offering party understood that they were in evidence, they must be so considered.'" (*Reed v. Reed* (1954) 128 Cal.App.2d 786, 790-791.) This is true in criminal as well as civil proceedings. (*Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 742-743.)

Defendant alleges this rule violates his right to due process, as "the judge cannot receive information from sources outside the evidence." (*Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108-109.) This argument misses the point. As noted above, when documents are not formally introduced, but it is apparent that the court and the offering party understood them to be in evidence, then the documents *are* in evidence, and are no longer considered information from sources outside of the evidence. Accordingly, defendant's argument must fail.

V. Sufficient Evidence Supported the Court's Finding of Dangerousness.

As noted above, under Proposition 36, statutorily eligible petitioners "shall be resentenced … unless the court, in its discretion, determines that resentencing the

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3 The People did not move to admit the written opposition and attached exhibits into evidence, but did submit for decision based on the "written opposition and the exhibits attached thereto."

petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) In exercising its discretion, "the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.26, subd. (g).)

We review a trial court's determination that an inmate poses an unreasonable risk of danger to public safety for an abuse of discretion. (*People v. Davis* (2015) 234 Cal.App.4th 1001, 1017.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

Here, the record shows that defendant was engaged in a nearly continuous course of serious and frequently violent criminal conduct from 1973—when defendant was 18 years old—to 1998—the year in which his current incarceration began. The record further shows that, during his current incarceration, defendant has repeatedly engaged in abusive behavior towards staff—particularly female staff, which echoes defendant's criminal history of domestic violence. Defendant also has instances of physical violence in his disciplinary record.

While defendant points to poor health and advanced age as reasons mitigating his present dangerousness, his disciplinary record shows verbally abusive behavior as recently as a year prior to the hearing on his petition for resentencing, and physically violent behavior as recently as 2009. Defendant's verbally abusive behavior is most troubling, as two instances from the year prior to his petition involved the abuse of female staff, and defendant's criminal history includes three separate convictions for corporal injury to a cohabitant. Given the combination of defendant's extensive and

serious history of violent crime, as well as his inability to refrain from abusive and intimidating behavior towards women while incarcerated, we cannot conclude the trial court abused its discretion by finding defendant posed an unreasonable risk of danger to public safety.

We also reject defendant's argument that the court's references to defendant's verbal assaults on prison staff improperly punished him for exercising his right to free speech. As a preliminary matter, we note that the court's finding was not based solely on defendant's history of verbally abusive behavior, but rather was based on that behavior, as well as defendant's prolific history of violence, both before and during his incarceration. Further, a prison inmate's rights, including his right to free speech, may be restricted if "reasonably related to legitimate penological interests." (§ 2600, subd. (a).) Finally, to the extent defendant suggests his verbal outbursts do not relate to the question of dangerousness, we must again disagree. It cannot seriously be asserted that, given his criminal history, defendant's verbally abusive behavior towards women was irrelevant to the question of his current dangerousness.

VI. Proposition 47's Definition of "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Appellant's Petition.

On November 4, 2014, voters enacted the Safe Neighborhoods and Schools Act (Proposition 47). Under Proposition 47, certain offenses that were previously sentenced as felonies or "wobblers" were reduced to misdemeanors, and individuals serving felony sentences for those offenses were permitted to petition for resentencing. (§ 1170.18, subd. (a).) Assuming the petitioning inmate meets the statutory eligibility requirements, the trial court must resentence the inmate in accordance with Proposition 47 "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Unlike Proposition 36, Proposition 47 specifically defines "unreasonable risk of danger to public safety." That definition reads as follows: "As used throughout this

Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (§ 1170.18, subd. (c).)

Section 667, subdivision (e)(2)(C)(iv) enumerates eight felonies or classes of felonies:

> "The defendant suffered a prior serious and/or violent felony conviction, as defined in subdivision (d) of this section, for any of the following felonies:
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> "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.
>
> "(II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.
>
> "(III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.
>
> "(IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.
>
> "(V) Solicitation to commit murder as defined in Section 653f.
>
> "(VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.
>
> "(VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.
>
> "(VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death." (§ 667, subd. (e).)

On appeal, defendant asserts that this definition of "unreasonable risk of danger to the public safety" also applies to petitions for resentencing under Proposition 36. We disagree.[4]

""""When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]"" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) However, "the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the [voters] did not intend." (*In re Michele D.* (2002) 29 Cal.4th 600, 606.)

Here, it appears clear that the phrase "[a]s used throughout this Code," employed in section 1170.18, subdivision (c), refers to the entire Penal Code, not merely the provisions contained in Proposition 47. (See *People v. Bucchierre* (1943) 57 Cal.App.2d 153, 164-166; see also *Marshall v. Pasadena Unified School Dist.* (2004) 119 Cal.App.4th 1241, 1254-1255; *People v. Vasquez* (1992) 7 Cal.App.4th 763, 766.) We conclude, however, that such an interpretation would lead to consequences the voters did not intend when they enacted Proposition 47.

By its provisions, Proposition 47 reduces the sentences of inmates serving felony sentences for specified offenses that are now classified as misdemeanors. Nowhere in the ballot materials on Proposition 47 were voters informed the law would also modify the resentencing provisions of Proposition 36, which concerns recidivist inmates serving sentences for felony offenses that remain classified as felonies.

The official title and summary, legal analysis, and arguments for and against Proposition 47 are all silent on what effect, if any, Proposition 47 would have on Proposition 36. As we cannot conclude the voters intended an effect of which they were unaware, we decline to conclude the voters intended for Proposition 47's definition of

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4 This issue is currently pending review by the Supreme Court. (See *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825; *People v. Payne* (2014) 232 Cal.App.4th 579, review granted Mar. 25, 2015, S223856.)

"unreasonable risk of danger to public safety" to apply to section 1170.126, subdivision (f), of Proposition 36.

Further, while we are aware "[i]t is an established rule of statutory construction ... that when statutes are in pari materia similar phrases appearing in each should be given like meanings" we are not persuaded that Propositions 36 and 47 are in pari materia. (*People v. Caudillo* (1978) 21 Cal.3d 562, 585, overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, 229, 237, fn. 6.) "'[S]tatutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object.'" (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4, quoting 2A Sutherland, Statutory Construction (Sands, 4th ed. 1984) § 51.03, p. 467.)

Here, Proposition 47 deals with individuals sentenced as felons for crimes that are now misdemeanors, while Proposition 36 deals with inmates with at least two violent or serious felonies who are currently serving indeterminate life sentences for a third felony conviction. These laws deal with very different levels of punishment, and very different severity of offenses. Even if the statutes are in pari materia, however, canons of statutory instruction are not dispositive, and serve as "mere[] aids to ascertaining probable legislative intent." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521, fn. 10.) Given our review of Proposition 47, we must conclude that voters intended the law to apply to the sentencing and resentencing of the misdemeanor offenses enumerated within that law, and not to the previously enacted provisions of Proposition 36. Accordingly, defendant is not entitled to resentencing under Proposition 36 to the definition of "unreasonable risk of danger to public safety" contained in Proposition 47.

DISPOSITION

The order is affirmed.